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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 2 6 2007
WAC-04-119-53285

In re: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a systems integration and software development company. It seeks to employ the beneficiary[2] permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had offered the beneficiary a permanent position or even that it had an employer-employee relationship with the beneficiary.

On appeal, the petitioner submits a brief and additional evidence. The petitioner asserts that Citizenship and Immigration Services (CIS) must properly weigh both favorable and unfavorable factors. All of the cases on which the petitioner relies, however, involve discretionary relief such as suspension of deportation pursuant to former section 244 of the Act. Not one of the cases cited by the petitioner involves an alien seeking benefits under section 203(b)(2) of the Act or any other employment-based visa category.[3] Section 291 of the Act provides, in pertinent part:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.

The burden is on the alien to establish eligibility "to the satisfaction" of the adjudicating officer. Section 291 of the Act, 8 U.S.C. § 1361. This burden is confirmed in *Matter of Soo Hoo,* 11 I&N Dec. 151, 152 (BIA 1965) and *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966). While the cases

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[1] The petitioner initially filed the Form I-290B, Notice of Appeal, with no accompanying brief or evidence. The petitioner then supplemented the Form I-290B with a brief and additional evidence. The brief was addressed to the AAO and lists the receipt number for the Form I-290B as the "Appeal case #." The brief uses the word "appeal" four times. Thus, while the first two sections of the brief explain how the filing meets the requirements of a motion to reopen, which it did not at the time of filing (there is no provision that would allow a petitioner to supplement a motion to reopen, *compare* 8 C.F.R. § 103.3(a)(2)(vii)), we will consider the filing an appeal.

[2] The beneficiary in this matter is substituted for the original beneficiary listed on the alien employment certification pursuant to *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994)(invalidating the portion of an interim final rule, 56 Fed. Reg. 54925, 54930 (Oct. 23, 1991), which eliminated substitution of labor certification beneficiaries pursuant to 20 C.F.R. § 656.30(c)(1) and (2)).

[3] *Villena v. INS,* 622 F. 2d 1352 (9th Cir. 1980), involved an alien who had previously petitioned for an employment-based visa, but the matter before the Ninth Circuit was an application for suspension of deportation. *Id.* at 1361.

cited by the petitioner are not relevant and the burden of proof remains on the petitioner, we will consider all of the evidence submitted in detail below.

Relating to the merits, the petitioner asserts that the entity that contracted out the beneficiary's services was the petitioner's wholly owned subsidiary and that the beneficiary reports to the petitioner. For the reasons discussed below, the evidence is inconsistent as to the relationship between the petitioner and the entity that contracted out the beneficiary's services. For this reason and the reasons discussed below, the petitioner has not overcome the director's bases of denial.

Section 204(a)(1)(F) provides:

> Any employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(2) . . . may file a petition with the Attorney General for such classification.

On August 1, 2006, the director requested evidence that the petitioner had offered the beneficiary a job. In response, the petitioner submitted a one-year employment contract between the petitioner and the beneficiary dated August 5, 2002; a contract between Datamethods and EAPT Solutions, Inc. (EAPT) whereby Datamethods agreed to provide staffing services for EAPT's client, Citigroup; and a statement of work whereby Datamethods and EAPT agreed that the beneficiary would provide consulting services for Citigroup for six months. The petitioner also submitted Forms W-2 issued by the petitioner to the beneficiary for 2003, 2004 and 2005.

On November 1, 2006, the director denied the petition. In the denial, the director noted the following: (1) the 2002 contract between the petitioner and the beneficiary provided that the beneficiary's length of employment was for only one year and, as such, could not demonstrate permanent full-time work; (2) the statement of work between Datamethods and EAPT provided for only six months of work and (3) the petitioner failed to identify where the beneficiary would be employed, but rather indicated that the beneficiary would work in-house, unless he was working on a client project, which the petitioner indicated could be anywhere in the United States. Finally, the director concluded that the petitioner had failed to provide a contract between Datamethods and the ultimate client, Citigroup, relating to the beneficiary's outsourcing. As a result, the director could not determine the beneficiary's terms and conditions of employment related to the Citigroup assignment.

The director concluded that the petitioner did not exercise direct control over the beneficiary and could not be considered the actual employer. The director noted that the petitioner would need to provide its complete contract with Citigroup to prove otherwise.

On appeal, the petitioner asserts that it was unable to obtain the contract between Datamethods and the beneficiary because the contract is confidential. The petitioner further asserts that Datamethods is a wholly owned subsidiary of the petitioner. The petitioner submits its 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return, indicating that the petitioner is a wholly owned subsidiary of Bitech International and that the petitioner is "affiliated" with

Datamethods. Specifically, the petitioner (1) answered "yes" to whether it owned 50 percent or more of a domestic corporation on Schedule K, line 3; (2) listed Datamethods as its subsidiary corporation on IRS Form 851 but failed to complete its stock holding information on Part II of that form; (3) specified that Bitech International, LLC owns 100 percent of the petitioner on Statement 5 to IRS Form 5472 and specified that Datamethods is an "affiliated group" member on Statement 6 to IRS Form 5472. On the petitioner's previous IRS Form 1120 tax returns, however, the petitioner indicated that it was owned by two individuals and, in response to line 3, Schedule K, that it did *not* own at least 50 percent of a domestic corporation. As will be discussed in more detail below, the petitioner has not resolved these inconsistencies pursuant to *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The first issue is whether or not the petitioner can be considered the beneficiary's employer. The regulation at 20 C.F.R. § 656.3, as in effect when the priority date in this matter was established, provides, in pertinent part:

> *Employment* means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.
>
> * * *
>
> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The staffing service guaranteed full-time permanent employment to its personnel. *Id.* at 773. The District Director determined in that matter that the staffing service, rather than its clients, was the beneficiary's actual employer. *Id.* To reach this conclusion, the District Director looked to the fact that the staffing service would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; withhold federal and state income taxes; and provide other benefits such as group insurance and a paid vacation. *Id.* at 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Regl. Commr. 1982), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. The Regional Commissioner stated:

> The petitioner in this instance is not an employment agency which only acts as broker in arranging employment between an employer and a job seeker. An employment placement agency acting as a broker does not qualify as the employer of the job seeker.

Id. at 286. *See also Matter of Artee*, 18 I&N Dec. 366 (Commr. 1982).

Given the language in the precedent decisions discussed above, there are factors to consider beyond who pays the beneficiary's wages.

The petitioner submitted a contract between EAPT, based in Edison, New Jersey, and Datamethods, based in Texas.[4] The contract provides the following, in pertinent part:

1. **SCOPE** The terms of this agreement apply in a situation where Contractor agrees to provide programming, systems analysis, engineering, technical writing or other specialized services as an independent contractor directly to the third party user client ("client") who has requested EAPT to locate temporary staffing for the client's project according to the training, skills, abilities and experience required by the client. EAPT agrees to examine Contractor's background for providing services to client, to refer Contractor to the client for further evaluation and possible retention of Contractor's services, to negotiate a rate for those services, and to otherwise perform as stated herein.

2. **TERM OF AGREEMENT** . . . Prior to the commencement of any services, EAPT and Contractor will execute a Purchase Order . . . which shall be considered part of this Agreement and binding upon both parties.

* * *

4. **NON-SOLICITATION AND NON-COMPETITION**

* * *

C. For the purposes of this paragraph 4, the term "Client" includes Citigroup Technology Services, or clients of the client for whom Supplier's personnel preformed or are, proposed by EAPT Solutions Inc[.] to perform services under this Agreement.

6. **PAYMENT FOR SERVICES** Payment for services will be made in the corporate or business name of contractor on the periodic basis set forth in the Purchase Order and up to the amount authorized in that Purchase Order for the client project. No other compensation in any form, including benefits, will be provided by EAPT or anyone else. For billing and payment purposes, Contractor shall maintain records of the hours that services have been performed, have a client representative verify those hours by signing the records, and submit to EAPT those records for the amount due to

[4] The address for Datamethods listed at the beginning of the contract is 5605 N. MacArthur Blvd., 10th Floor in Irving, Texas.

Contractor for the hours worked and verified. Contractor will also invoice EAPT only for the hours covered by such records.

* * *

9. **CONDUCT, INDEPENDENT STATUS, AND BENEFITS** . . .

Contractor is:

> A valid corporation existing under the laws of the **State of Texas** doing business with the corporate name or business name of **DataMethods, Inc.** and certify [sic] that its federal employer identification number (EIN) is 20-2629618.

The parties to this Agreement agree that the relationship created by this agreement is that of broker-independent contractor. Contractor agrees and has advised its personnel that Contractor and its personnel are not employee(s) of EAPT or the client and are not entitled to (and also hereby waive) any benefits provided or rights guaranteed by EAPT or the client. . . . It is understood and agreed that since the Contractor is an independent contractor, EAPT will make no deductions from fees paid to Contractor for any federal or state taxes or FICA, and EAPT and the client have no obligation to provide Worker's Compensation coverage for Contractor or to make any premium "overtime" payments at any rate other than the normal rate agreed to in the Purchase Order. It shall be the Contractor's responsibility to provide Worker's Compensation and, if applicable, pay any premium "overtime" rate, for its employees who work on the project covered by this Agreement . . . .

* * *

16. **MISCELLANEOUS**

* * *

Contractor agrees that all of its personnel working on client projects covered by this Agreement shall sign an "Employee Consent" form . . . agreeing to the terms of paragraphs 4, 8, 9, and 12 of this Agreement. The Employee Consent form will be delivered to EAPT before such personnel begin work under any Purchase Order.

The Director of Operations for EAPT and the Vice President for Datamethods signed the agreement on September 15, 2005. Attached to the document was a "Statement of Work" signed by EAPT and Datamethods, which provided that the beneficiary would work for Citigroup on a six-month project. The rate of pay was crossed out. The "pay terms" were based on monthly invoice. The "scope and duration" provided that the "[c]onsultant shall provide services as directed by the client."

The Record of Proceeding also contains the one-year 2002 Employment Agreement between the petitioner and the beneficiary, which provides, in pertinent part (section 2(e)):

> **Term**. The term of this Agreement and the term of employment . . . shall commence on the date herein below signed, and shall continue for one (1) year from the date on which Employee first begins working full-time for the Company, unless sooner terminated. . . . The Employment Term shall be automatically extended, following the expiration of the initial one year term, for successive one (1)-month periods (thirty calendar days) until and unless either party hereto gives the other such party written Notice.

The EAPT and Datamethods contract is not the final contract; rather the beneficiary's work would be determined by a contract signed by Citigroup, which the petitioner did not provide.

From the Datamethods/EAPT contract provided, it is not clear that the petitioner would be the actual employer. Datamethods, which is listed in the contract as being based in Texas and having a separate tax identification number than the petitioner, is the actual employer. The petitioner's assertion on appeal, that Datamethods is a wholly owned subsidiary of the petitioner, is not consistently supported in the record. As stated above, while the 2005 tax return submitted on appeal lists Datamethods as an affiliated corporation based at the same location in California as the petitioner, Datamethods is not listed on the petitioner's earlier tax returns, submitted previously, and the Datamethods/EAPT contract provides a Texas address for Datamethods. The record contains no evidence that Datamethods is authorized to operate in California. As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not resolved the inconsistencies between its 2005 tax return and the earlier returns.

Even if Datamethods is a wholly owned subsidiary of the petitioner, and the record is inconsistent on this matter, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530, 531 (Commr. 1980); and *Matter of Tessel*, 17 I&N Dec. 631, 633 (Act. Assoc. Commr. 1980). Thus, the petitioner would still not be the employer. This conclusion is reinforced by the petitioner's admitted inability to obtain a copy of the ultimate contract with Citigroup regarding the beneficiary's employment at Citigroup.

In light of the above, we concur with the director that the employment arrangement is too attenuated to consider the petitioner the actual employer. While the petitioner need only be offering permanent full-time employment for the future, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The inconsistencies between the Forms W-2 issued by the petitioner, the 2002 contract between the petitioner and the beneficiary, the Datamethods/EAPT contract and the tax returns regarding Datamethods' affiliation with the

petitioner have not been resolved. Thus, the petitioner's credibility is reduced and its affirmations that it had offered the beneficiary a position as of the priority date have little evidentiary value.

Moreover, on appeal, the petitioner, through its associate general counsel, asserts that the director "did not take into consideration that obtaining the contract between EAPT Solutions and Citigroup was confidential and privileged information that only EAPT Solutions and Citigroup are privy to." The petitioner further asserts that the petitioner tried to obtain a copy of the contract between EAPT and Citigroup, but that obtaining a copy of the agreement was difficult and unusual as companies will often not release such contracts since much of the information is "confidential in nature." The petitioner concludes that it does have a permanent position for the beneficiary, and that it provided evidence that the beneficiary "would ultimately be placed at Citigroup performing software engineering type work." Thus, despite the new contract between the petitioner and the beneficiary submitted on appeal, the petitioner implies that not only has the beneficiary worked for Citigroup as placed through EAPT by Datamethods in the past, but that the beneficiary will continue to work at Citigroup in New Jersey.

The second issue is whether the offered position falls within the geographic location specified on the Form ETA 750. As stated above, the petitioner asserts on appeal that the beneficiary will continue to work in New Jersey. The petitioner provided a copy of an electronic-mail notice relating to the beneficiary's placement dated December 21, 2006. The notice provides:

> This is to verify that Citigroup Inc., located at [redacted] . . currently has [the beneficiary] on a full-time project as a consultant Computer Engineer since September 26, 2005. [The beneficiary] is on assignment with Citigroup through a contract with EAPT Solutions, Inc.

A labor certification for a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2).

The labor certification is valid for the beneficiary's employment in California, the listed work location. While the labor certification contemplates other locations in Northern California, the labor certification does not contemplate "unknown" locations throughout the U.S., or employment in New Jersey. EAPT is based in New Jersey. The petitioner's electronic-mail notice provides that the beneficiary has been working in New Jersey for Citigroup and the petitioner strongly implies that the beneficiary will continue working for Citigroup. Therefore, the beneficiary's employment will not occur at the listed location on the certified ETA 750.

The petitioner directly admits that it has employed and intends to employ the beneficiary outside the terms of the labor certification through placement in New Jersey. Such employment calls into question the validity of the alien employment certification. *See* 20 C.F.R. § 656.30(c)(2); *see also Matter of Sunoco Energy Development Company*, 17 I&N Dec. 283, 284 (Regl. Commr. 1979).

Based on the foregoing, the petitioner has failed to overcome the reasons for the petition's denial. Specifically, the petitioner has not, with consistent and credible evidence, demonstrated that it intends to employ the beneficiary full-time in accordance with the terms of the labor certification.

Beyond the decision of the director, our review of electronic records relating to petitions filed by the petitioner raises issues of the petitioner's ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 29, 2001. The proffered wage as stated on the Form ETA 750 is $7,843.34 per month, which amounts to $94,120.08 annually. On the Form ETA 750-B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2002.

On the petition, the petitioner claimed to have an establishment date in 1995, a gross annual income of $22,700,000, a net income of $203,000 and 211 employees. In support of the petition, the petitioner submitted a statement from its Chief Financial Officer (CFO).

On August 1, 2006, the director requested that the petitioner provide information related to the petitioner's ability to pay the beneficiary the proffered wage, including the petitioner's federal tax returns for the years 2001, 2002, 2003, 2004, and 2005, as well as copies of the beneficiary's W-2 Forms for the years 2004, and 2005. The RFE further noted that the petitioner paid the beneficiary $61,128.95 in 2003, when the proffered wage was $94,120.08, and requested an explanation for this difference.

In response, the petitioner submitted IRS Form 1120 U.S. Corporation Income Tax returns for the years 2002, 2003 and 2004. The tax returns show either sufficient net income or sufficient net current assets to pay the proffered wage for *this beneficiary*. CIS records, however, show that the petitioner has filed immigrant and non-immigrant petitions in behalf of over 600 beneficiaries since

the company began its business. Thus, even if we did not uphold the director's basis of denial, we would need to remand the matter for an inquiry into the petitioner's ability to pay the proffered wage of all of the beneficiaries of pending petitions.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.